

No. 11593

United States

2468

Circuit Court of Appeals

For the Ninth Circuit.

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

JUN 1 1967

PAUL M. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

ROBERT A. WARING, ESQ.

For Commissioner:

A. J. HURLEY, ESQ.

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1945

Sept. 10—Petition received and filed. Taxpayer notified. Fee paid.

Sept. 10—Copy of petition served on General Counsel.

Sept. 10—Request for hearing at Los Angeles, California, filed by taxpayer. 9/20/45. Granted.

Nov. 2—Answer filed by General Counsel.

Nov. 6—Copy of answer served on taxpayer. Los Angeles, California.

1946

Apr. 8—Motion to advance hearing to 6/10/46 filed by taxpayer. 4/11/46 Granted.

Apr. 16—Hearing set 6/10/46, Los Angeles, California.

June 20—Hearing had before Judge Black on merits. Stipulation of facts filed. Briefs due 8/5/46. Replies 9/5/46.

July 8—Transcript of hearing 6/20/46 filed.

Aug. 5—Motion for extension of time to 8/30/46 to file brief, filed by General Counsel. 8/6/46 Granted.

1946

- Aug. 5—Brief filed by taxpayer. 9/3/46 Copy served.
- Aug. 30—Brief filed by General Counsel. Copy served 9/3/46.
- Nov. 12—Findings of fact and opinion rendered, Judge Black. Decision will be entered for the respondent. Copy served.
- Nov. 13—Decision entered. Judge Black, Div. 15.

1947

- Feb. 10—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.
- Feb. 12—Proof of service of petition for review filed. (Tax Court.)
- Feb. 12—Proof of service of petition for review filed. (Taxpayer.)
- Mar. 21—Stipulation of Venue filed.
- Mar. 26—Statement of points and designation of parts of record to be printed, with proof of service thereon, filed by taxpayer.
- Mar. 26—Agreed statement of evidence filed by taxpayer.
- Mar. 26—Designation of record with agreement and proof of service thereon filed.
- Apr. 8—Certified copy of an order from the 9th Circuit extending time to May 1, 1947, to prepare and transmit the record filed.

The Tax Court of the United States

Docket No. 9117

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Internal Revenue Agent In Charge in his notice of deficiency (Bureau Symbols LA:IT:90D:PAK) dated August 31, 1945, and as a basis of his proceeding alleges as follows:

1. The petitioner is an unmarried individual with residence in Los Angeles, California, care of Robert A. Waring, 412 West Sixth Street, Los Angeles, California. The return for the period here involved was filed with the collector for the sixth district of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on August 31, 1945.

3. The taxes in controversy are personal income taxes for [2*] the taxable year ending December 31, 1943, and in the amount \$1311.01 of which

* Page numbering appearing at top of page of original certified Transcript of Record.

\$1162.01 is in dispute. There is no dispute as to the tax on \$1418.59 received in 1942 for personal services rendered in the United States at Burbank, California, prior to June 30, 1942, for Vega Aircraft Corporation and Lockheed Overseas Corporation which tax amounts to \$149.00 and has been paid by the taxpayer.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) In determining the taxable net income of petitioner for the year 1942, the Commissioner and Revenue Agent in Charge erroneously included the sum of \$2600.00 earned by taxpayer while a bona fide resident overseas.

(b) In determining the net income for the year 1943, the Commissioner and Revenue Agent In Charge erroneously included the sum of \$5,262.50 earned outside of the United States by taxpayer while a bona fide resident of North Ireland.

5. The facts upon which petition relies as the basis of this proceeding are as follows:

(a) That at all times during the periods in question taxpayer J. Gerber Hoofnel was a bona fide resident of the British Isles and North Ireland within the meaning of the Revenue Code, particularly Sec. 116 thereof, and as the term resident is defined in Regulations 111, Section 29.211-2 thereof.

He embarked at New York City June 30, 1942, on H.M.S. Maloja, bound for and arriving at the British Isles July 12, 1942. [3] He thereupon resided in the British Isles and North Ireland until his return to the United States in 1944, leaving the British Isles June 30th of that year and arriving in New York City July 12, 1944, on U. S. S. Hermitage.

It was his intention when he entered the employ of Lockheed Overseas Corporation to continue with them overseas for the duration of the war and as long thereafter as necessary for their performance of their agreements with the United States Army; he so committed himself in his application to the corporation before going overseas, and in May, 1943, he further signed a contract with said corporation confirming this understanding; and at no time during said period did he or could he have any definite intention to return to the United States and in fact the then hazards of the war made it uncertain whether or not he might ever be able to return to the United States.

Wherefore, petitioner prays that this court may hear the proceedings and determine that there is no deficiency due from petitioner for the year ending December 31, 1943 (including therein any deficiency for the year 1942).

/s/ ROBERT A. WARING,

Counsel for Petitioner. [4]

State of California,
County of Los Angeles—ss.

J. Gerber Hoofnel, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

J. GERBER HOOFNEL.

Subscribed and sworn to before me this 7th day of Sept., 1945.

MYRA BARNES DAY,
Notary Public. [5]

EXHIBIT A

15

417 South Hill Street.

LA:IT:90D:PAK

Aug. 31, 1945.

Mr. J. Gerber Hoofnel,
501 South Ardmore Avenue,
Los Angeles 5, California.

Dear Mr. Hoofnel:

You are advised that the determination of your income and victory tax liability for the taxable year ended December 31, 1943, discloses a deficiency of \$1,311.01, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency.

Very truly yours,

JOSEPH D. NUNAN, JR.,
Commissioner.

/s/ By RAYMON B. SULLIVAN,
Acting Internal Revenue
Agent in Charge.

PAK:vsc

Enclosure

Statement [6]

Statement

LA:IT:90D:PAK

Mr. J. Gerber Hoofnel
501 South Ardmore Avenue
Los Angeles 5, California

Tax Liability for the Taxable Year
Ended December 31, 1943

Income and Victory Tax.....	Deficiency \$1,311.01
-----------------------------	--------------------------

In making this determination of your income and victory tax liability careful consideration has been given to the report of examination dated January 25, 1945, to your protest dated March 2, 1945, and to the statements made at the conferences held.

It is held that compensation in the amount of \$1,418.59 received by you during the year 1942 for personal services rendered in the United States for Vega Aircraft Corporation and Lockheed Overseas Corporation, and compensation in the amounts of \$2,600.00 and \$5,262.50 received by you in 1942, and 1943, respectively, for services rendered while temporarily employed in Northern Ireland by Lockheed Overseas Corporation, represent taxable income under the provisions of Section 22 of the Internal Revenue Code, as amended.

It is held further that all earnings during your temporary employment in Northern Ireland may not be excluded from gross income under section 116 of the Internal Revenue Code, as amended.

Adjustments to Net Income

Taxable Year Ended December 31, 1942

You filed a return on form 1040A for the period January 1, 1942, to June 30, 1942, disclosing a net income of \$1,420.59. A return on form 1040 was filed for the period July 1, 1942, to December 31, 1942, which discloses no net income. Inasmuch as a return was not filed for the taxable year ended December 31, 1942, your net income has been determined as follows:

(a) Salary received	\$4,018.59
(b) Dividends received	2.00

Net Income determined	\$4,020.59

Statement shows total income tax of \$690.41 on above 1942 income. [7]

Adjustments to Net Income
Taxable year ending December 31, 1943

Income:	
(a) Income from salary	\$5,262.50
(b) Income from dividends	4.00
	\$5,266.50
Deductions:	
(a) Contributions	92.00
	\$5,174.50
Net Income for 1943.....	\$ 964.32
Income Tax	174.09
Victory Tax	172.60
Unforgiven 1942 Tax	\$1,311.01
Deficiency	

Received and filed Sept. 10, 1945. [8]

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are personal income taxes for the taxable year ending December 31, 1943; denies the remainder of the allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph 4 of the petition.

5. Denies the allegations contained in paragraph 5 of the petition. [9]

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL—ECC
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
E. C. CROUTER,
A. J. HURLEY,
Special Attorneys, Bureau of
Internal Revenue.

AJH/mm 10/23/45.

Received and filed Nov. 2, 1945. [10]

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

To the Tax Court of the United States:

It is hereby stipulated and agreed, by and between the parties hereto, by their respective counsel, that

the following facts shall be taken as true, without prejudice to the right of either party to introduce other and further evidence not inconsistent therewith:

1. From January 1 to June 30, 1942, petitioner J. Gerber Hoofnel was employed as a Secretary in the United States by Vega Aircraft Corporation and Lockheed Overseas Corporation, of Burbank, California.

2. On or about February 18, 1942, he made out and signed a formal application for overseas employment by Lockheed Overseas Corporation, a true and correct copy of which application is attached hereto and made a part hereof as Exhibit 1. In connection with such employment, petitioner in May of 1942 signed a contract [11] with Lockheed Overseas Corporation in which he agreed to perform services for that company at aircraft depots operated by it in North Ireland, a true and correct copy of which contract is attached hereto and made a part hereof as Exhibit 2.

3. Pursuant to his employment and said contract, J. Gerber Hoofnel, on June 30, 1942, embarked on His Majesty's Steamship Maloja, a vessel of British registry. The Maloja sailed from New York harbor early on the morning of July 1, 1942, bound for the British Isles.

4. Pursuant to his employment and said contract above mentioned, the expiration date of said contract was extended by agreement of the parties

to it until May 1, 1943, at which time he entered into a new contract with Lockheed Overseas Corporation, a true and correct copy of which is attached hereto and made a part hereof as Exhibit 3. The petitioner remained in the employ of Lockheed Overseas Corporation stationed at a base in Northern Ireland until July 13, 1944, at which time he returned to the United States.

5. Petitioner received as compensation for personal services rendered to Lockheed Overseas Corporation in Northern Ireland during the year 1942, the sum of \$2,600.00 and during 1943 the sum of \$5,262.50, of which 90% of said amounts was deposited by said Lockheed Overseas Corporation to the account of the petitioner with the Bowling Green Trust Co., Bowling Green, Kentucky, pursuant [12] to the provisions of the contract of employment.

6. On October 9, 1944, petitioner filed income tax returns for the period June 30, 1942, to January 1, 1943, and for the taxable year 1943 with the Collector of Internal Revenue for Baltimore, Maryland, in which returns the petitioner excluded from his gross income the aforesaid amounts of \$2,600.00 and \$5,262.50, respectively, on the ground that during the period from June 30, 1942, to January 1, 1944, the petitioner was a bona fide resident of a foreign country within the meaning of Section 116 of the Internal Revenue Code.

7. The petitioner did not at any time make any application to become a citizen of Northern Ireland, or a British subject. During the years 1942

and 1943, petitioner was domiciled in the United States.

/s/ ROBERT A. WARING,
Counsel for Petitioner.

/s/ J. P. WENCHEL, ECC
Chief Counsel, Bureau of
Internal Revenue,
Counsel for Respondent.

Filed June 20, 1946. [13]

Occupation Best Qualified for, By Code No. 372 1. 322 2.

Placement
Division

()
A B C

1 2 3

APPLICATION FOR FOREIGN SERVICE

Senior Steno. 372-2

Dept. & Shift Dept. #39- Shift: Day

Occup. Code 37243

Name HOOFNEL, JOHN GERER Clock No. 37243
Print Last First Middle
Present Address 501 S. Ardmore, Los Angeles, California

Number Street City

Are you willing to go to any part of the world? Yes For how long? 1 year 2 years Longer X

Do you understand your services may be in a war combat zone and travel to this point will be hazardous? Yes

Do you understand you may not Take your wife or any member of the family? Yes but they have a phone

Mr. & Mrs. John P. Hoofnel, 525 Park St., Bowling Green Ky. (Parents) -Don't know 'phone No. /
Name, Address, Telephone No., and Relation of Person to be Notified in Emergency

Will you submit to rigid medical examination Yes Inoculation? Yes

Race White Color of hair Dark Brown Height 6'4" Weight 150 Present age 40 Length of residence Approx. 12 years What cities in L.A. Co. Los Angeles

Draft Classification None Local Board No. - City - State - S.S.No. -

What military or naval experience? None Final Rating -

What foreign languages do you speak and/or read? None

A and/or E License - Other C.A.A. Ratings -

What foreign country have you lived in? None For how long? -

What special qualifications, Lockheed service, etc., have you? -

(SEE ATTACHED PAGE)

EXHIBIT No. 2

Secret

Agreement of Employment

Agreement made this day of, 1942, by and between Lockheed Overseas Corporation, a Delaware corporation with its principal place of business in Burbank, California, and (hereinafter sometimes referred to as Employee), an individual residing at

Recitals

A. Pursuant to a certain Letter of Intent from the War Department of the United States of America (hereinafter sometimes referred to as the Government), Lockheed Aircraft Corporation, a California corporation with its principal place of business in Burbank, California, (herein called Lockheed), and the Government have entered into a contract for the organization, equipment, and operation of an aircraft depot outside the continental limits of the United States.

B. For the purpose of expediting the performance of such work, Lockheed Overseas Corporation, a wholly owned subsidiary of Lockheed, has accepted designation as major subcontractor under the above mentioned contract and has entered into a subcontract with Lockheed under which Lockheed Overseas Corporation has undertaken to organize, equip, and operate said aircraft depot. Said contract and subcontract (hereinafter for convenience

referred to collectively as the Government contract) are subject to extension of the term thereof and subject to termination by the Government under the terms and conditions therein set forth. The subsidiary, Lockheed Overseas Corporation, is hereinafter referred to as Contractor.

C. Contractor desires to employ Employee for work in connection with the organization, equipping, and operation of said aircraft depot; and Employee desires to accept such employment in accordance with the terms and conditions contained herein.

D. Employee understands that he may and probably will be called upon to render services hereunder in a war combat zone in a foreign country or countries under relatively difficult living and working conditions, and that travel of Employee may be subject to the dangers of war and travel by land, sea, and air.

Agreement

In consideration of the premises, the mutual covenants and promises herein contained, and for other good and valuable considerations, the parties hereto agree as follows:

Article 1. Time and Duration of Employment

Contractor employs Employee to render service in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge

of the conditions recited above. Subject to the terms and conditions hereinafter set forth, Employee's employment hereunder shall commence when he reports for duty at a point [15] within the United States to be designated by Contractor, at the time and place designated by Contractor, and shall continue until November 1, 1942, or such later date as may be agreed upon and thereafter until sixty (60) days after return transportation to the United States is made available by Contractor, it being understood that such return transportation shall be made available on November 1, 1942, or the later date agreed upon or as soon thereafter as is practicable under the circumstances then existing.

Article 2. Amount, Time and Mode of Payment of Salary

Employee's salary as long as he remains employed hereunder shall be at the rate of dollars per month, lawful money of the United States (sometimes hereinafter referred to as foreign salary) payable semi-monthly, in United States Dollars except as hereinafter stated, provided however, that Employee's salary while employed hereunder in the United States shall be at the rate of sixty per cent (60%) of the foreign salary.

Unless otherwise approved by Contractor, the salary payable to Employee while employed hereunder outside of the United States (less any lawful deductions including any amounts paid to Employee by Contractor at Employee's place of duty), shall be deposited for the account and at the risk of

Employee in a bank in the United States to be designated by Employee or, in the absence of such designation, in a member bank of the Federal Reserve System to be selected by Contractor, and a duplicate deposit slip or receipt of such bank shall constitute conclusive evidence of payment to Employee.

Contractor shall pay to Employee at his place of duty from time to time, amounts which shall not in the aggregate exceed during any one (1) month, ten per cent (10%) of Employee's salary for such month, payable in pounds sterling or United States dollars, at the sole discretion of the Contractor, but the foregoing provision of this sentence shall not apply while Employee is in the United States.

The Employee shall not seek reimbursement from the Contractor for any foreign exchange loss that he may incur in converting into Sterling United States money payable to him as compensation hereunder.

Prior to debarkation at the Point of entry, Contractors shall pay the Employee the sum of Fifty Dollars (\$50.00) as an advance against his salary, and the amount of such advance shall be immediately deducted from the salary payable to or for the account of Employee thereafter or from successive salary payments in such amounts as Contractor may deem expedient or advisable.

For each continuous period of six (6) consecutive months of employment hereunder outside of the United States Contractor shall pay to Employee, in addition to the salary to which Employee is

otherwise entitled, the equivalent of one-half month's foreign salary and such additional salary shall not be in lieu of pay during such reasonable vacation leave as may be authorized by Contractor. Vacations and sick leave policies will be governed by regulations prescribed by the Contractor at the site.

Because of the emergency nature of the work and the salary to be paid to Employee, there shall be no restriction (except such as may be imposed by the medical authorities having jurisdiction) upon the number of work hours per day or the number of work days per week. The salary and compensation herein provided for Employee being substantially in excess of that which Employee has been receiving or would have received for similar services rendered in the United States at the date hereof, includes compensation for any extra and overtime services to be performed, and Employee shall not be otherwise paid or compensated for services which would ordinarily be extra or overtime services.

Failure on the part of Contractor to respond to the precise time and mode of payment of salary prescribed herein shall not be considered as a breach or default on the part of Contractor in those cases in which such failure is the result of causes beyond Contractor's control.

Article 3. Performance by Employee

Employee shall diligently and faithfully render such services and shall abide by all rules, regulations and requirements of Contractor, its officers,

agents, and supervisory employees, as well as those of the United States Government and/or the War Department, and all civil or military laws and regulations in effect from time to time at the place or places of duty hereunder during the continuance of and in connection with Employee's employment hereunder.

Article 4. Transportation

Employee consents to travel by rail, sea, and air, according to routes and by any mode of conveyance which Contractor may reasonably specify in reporting for and rendering services during employment and in traveling to and from the site.

When directed by Contractor, Employees shall return to the United States without delay by such route and means as Contractor may designate. Except as herein otherwise provided, Contractor shall furnish, cause to be furnished, or reimburse Employee for his reasonable disbursements for transportation, food, and accommodations from his present place of residence to the place of foreign duty and return to the extent that his travel is authorized or approved by Contractor.

Article 5. Passports and Preparation for Travel

This agreement is predicated upon satisfactory proof furnished by Employee that he is a citizen of the United States of America or Great Britain, and upon his ability to secure necessary passports, visas and such other permits as may be necessary to authorize his departure and absence from the

United States, to pass such physical examination, and to submit to such disease immunization and fingerprinting as may be required by proper authority or by Contractor.

If Employee is so qualified, Contractor shall obtain or cause to be obtained the necessary passports, travel permits and visas, for Employee without cost to him.

Article 6. Baggage and Property of Employee

Employee's personal baggage shall not exceed an amount to be specified by Contractor at the time of embarkation, and Contractor shall not be liable or responsible for any property of Employee or for loss or damage thereto in transit or elsewhere.

Employee shall comply with all custom and other laws and regulations of the countries from, to, or through which any of the Employee's property may be transported.

Article 7. Housing, Subsistence and Medical Services

During the time that Employee is employed hereunder and remains at the place or places of his duty outside of the United States, Contractor shall furnish or cause to be furnished, without cost to Employee, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Employee shall submit prior to departure and from time to time during his employment to such

vaccination, inoculation, and/or any other medical, dental, surgical, nursing, and/or hospital treatment, preventative or curative, as the Contractor or other medical staff at the destination or elsewhere may from time to time specify, without expense to Employee.

Contractor may direct the return to the United States of Employee, if in Contractor's judgment Employee's health condition is unfavorable. [18]

Article 8. Compensation for Disability, Death, Capture, or Detention

A. (1) For the purpose of paying workmen's compensation benefits Contractor will voluntarily provide benefits as prescribed in the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), and such benefits shall be payable to Employee or his dependents as provided in said Act. In event the injury to Employee resulting in disability or death occurs at or about the place where Employee's services are being rendered, or during transportation to or from such place, such injury shall be presumed to have arisen out of and in the course of employment whether employee then actually was so engaged; provided, that no benefits shall be payable if the injury or death was occasioned solely by the intoxication of the Employee or by the willful intention of the Employee to injure or kill himself or another.

(2) Employee who is ascertained to be missing from his place of employment, whether or not such Employee then actually was engaged in the course of his employment, under circumstances supporting an inference that his absence may be due to the belligerent action of an enemy, or who is known to have been taken by an enemy as a prisoner, hostage, or otherwise, until such time as he is returned to his home, to the place of his employment, or is able to be returned to the jurisdiction of the United States, upon approval of Contractor and within the discretion of the Contracting officer who executed the prime contract with Contractor, or his duly authorized representative, shall be regarded solely for the purpose of this provision as deceased, and the benefits as are provided for death under the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), shall be paid to his beneficiaries, as provided under this agreement, until such time as his return has been accomplished or he is able to be returned, or death in fact is established, or can be legally presumed to have occurred, and any payment made pursuant to this provision shall not in any case be included in computing the maximum aggregate or total payable compensation for death, as provided in the said Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended

by the Act of August 16, 1941 (Public Law No. 208—77th Congress).

(3) If Employee, or his dependents in the event of death, be awarded benefits under any workmen's compensation law of the United States or under the workmen's compensation law of any state, territory, possession or other jurisdiction for disability, death, capture or detention, Contractor shall pay the benefits so awarded by competent authority and such payments shall be in lieu of the voluntary benefits provided in subsections (1) and (2) of this section A. [19]

(4) If this agreement provides for payment of wages or salary of Employee during any period in which Employee or his beneficiaries would also be entitled to benefits under subsections (1), (2) or (3) of this section A, any benefits so payable hereunder for disability, death, capture or detention shall be a part of, and not in addition to, the wages or salary paid during such period pursuant to this agreement.

(5) Employee shall not be entitled to salary for any period during which he does not render services hereunder because of disability or captivity and detention, nor to receive disability benefits for any period during which he is entitled to receive benefits for captivity and detention.

Article 9. Taxes

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or

assessed by any foreign Government against Employee with respect to his residence, occupation, salary, or income, provided, however, that Employee shall immediately notify Contractor in writing of any such levy or assessment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

Article 10. Tools

Contractor shall furnish or cause to be furnished tools and equipment for rendition of services hereunder by Employee, but such tools and equipment hereunder shall remain at all times the property of Contractor.

Article 11. Termination

A. Contractor may terminate Employee's and his right to receive further salary hereunder for any of the following causes:

(1) If the Contracting Officer representing the Government requires the dismissal of Employee as deemed by him to be necessary or advisable in the interests of the Government.

(2) If Contractor has reason to believe that Employee is not trustworthy, careful, or otherwise

qualified to render the services required hereunder.

(3) If Employee, in the opinion of the medical examiner or examiners designated by Contractor, is found to be afflicted with any venereal disease.

(4) If Employee violates any of the provisions of this agreement. [20]

(5) Completion by Contractor of its contract with the Government.

(6) Termination by the Government of its contract with the Contractor.

B. Under the terms of this article, Contractor shall not arbitrarily terminate Employee's employment and Contractor shall take into consideration all extenuating circumstances that may be involved except when required by the Contracting Officer to dismiss Employee as set forth in (A) (1) of this article.

C. In the event that the Employee terminates his employment hereunder voluntarily he shall not, unless otherwise approved by the Contractor, be entitled to return transportation to the United States or reimbursement therefor.

Article 12. Military Information

This agreement includes, refers to, or incorporates classified military information within the scope of the law and regulations governing the safeguarding of military information. Employee shall comply with the requirements of the pertinent regulations, particularly paragraphs 53 and 60 of Army Regulations No. 380-5, June 18, 1941, as

they may be amended or supplemented from time to time, and with any special instructions which may be issued pursuant thereto, and shall not publish, divulge, or sell anything which includes, refers to, or incorporates such classified military information without specific authority therefor from the Government. Employees shall not at any time subsequent to entering into this agreement, without the prior written consent of Contractor and the Government as represented by the War Department, publish or cause to be published in any manner or by any means, either by statements, photographs, pictures, books, articles, reports, charts, graphs, maps, or otherwise, written, pictorial, or oral, directly or indirectly relating to this agreement, the Government contract, his employment hereunder, or any other matters relating to the organization, equipping, or operation of said aircraft depot. The provisions of this paragraph may be enforced by injunctive relief and by any other applicable legal remedies.

Article 13. Disputes

Except as otherwise specifically provided in this agreement, all disputes between Contractor and Employee concerning questions of fact arising under this contract shall be decided by the Contracting Officer who executed the Government Contract or his duly authorized representative or successor (or, if there then be no Contracting Officer, by such person, if any, as may be designated by the Secretary of War for the purpose) subject to writ-

ten appeal by either party within thirty (30) days to said Secretary of War or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. [21]

Article 14. Employee's Work Record

Before Employee returns from the foreign site, Contractor shall make in duplicate a record of his employment stating the circumstances under which Employee is returning, upon which Employee shall set forth the nature, extent and the amount of all claims of Employee against the Contractor under or arising out of this contract or his employment hereunder. Both copies of this record shall be signed by Contractor and Employee and one copy of this record shall be given to Employee who shall present same to Contractor upon his return to continental United States. No claims of any nature shall be recognized nor shall Employee be entitled to payment of any compensation, benefits or other sums whatever except upon the presentation of such record of employment and in accordance with the entries therein contained. Should such record of employment be lost or Employee be unable for any other reason to present the same upon his return, Contractor shall, as promptly as circumstances permit, obtain a duplicate of such record from the field office at the foreign site of the work and any claims which Employee may have will be adjusted promptly upon receipt of such duplicate, but not otherwise.

Article 15. Miscellaneous

This agreement shall be construed and interpreted solely in accordance with the laws of the State of California, may not be assigned by either party without the written consent of the other party, constitutes the entire agreement between the parties hereto relating to the subject matter hereof, and shall not be binding until executed by an officer of the Contractor at its office in the City of Burbank, California.

Article 16. Headings

The headings of the various articles of this contract are for convenience and reference only and are not to be read or construed as a part of the contract.

In Witness Whereof Contractor has caused this agreement to be executed in duplicate in the City of Burbank, State of California, by its officer thereunto duly authorized and its corporate seal to be affixed hereto, and Employee has executed the same, in duplicate, the day and year first above written.

[Seal]

LOCKHEED OVERSEAS CORPORATION,

By
President.

Witness to signature of Employee

.....
.....

Employee. [22]

Extension of Agreement of Employment

In accordance with Article I of the Employment Agreement heretofore entered into between Lockheed Overseas Corporation, a Delaware corporation, and the undersigned Employee, it is hereby agreed that the later date provided for in said Article I shall be May 1, 1943.

All other provisions of said Agreement shall remain in full force and effect except that part of Article II relating to the monthly rate of pay which is hereby changed to read from \$..... to \$.....

LOCKHEED OVERSEAS
CORPORATION,

By

.....
Employee.

Date: [23]

EXHIBIT No. 3

Secret

Agreement of Employment

Agreement made this day of, 1943 by and between Lockheed Overseas Corporation, a Delaware corporation with its principal place of business in Burbank, California, and(hereinafter sometimes referred to as Employee), an individual residing at.....

Recitals

A. The United States of America (hereinafter sometimes referred to as the Government) and Lockheed Aircraft Corporation, a California corporation with its principal place of business in Burbank, California, (herein called Lockheed) have entered into a contract for the organization, equipment and operation of an aircraft depot outside the continental limits of the United States, the term of which contract has been extended by exchange of letters and may be hereafter further extended.

B. For the purpose of expediting the performance of such work, Lockheed Overseas Corporation, a wholly owned subsidiary of Lockheed, has accepted designation as major subcontractor under the above mentioned contract and has entered into a subcontract with Lockheed under which Lockheed Overseas Corporation has undertaken to organize, equip and operate said aircraft depot. Said contract and subcontract (hereinafter for convenience

referred to collectively as the Government contract) are subject to extension of the term thereof and subject to termination by the Government under the terms and conditions therein set forth. The subsidiary, Lockheed Overseas Corporation, is hereinafter referred to as Contractor.

C. Contractor desires to employ Employee for work in connection with the operation of said aircraft depot; and Employee desires to accept such employment in accordance with the terms and conditions contained herein.

D. Employee understands that he will probably be called upon to render services hereunder in a war combat zone in a foreign country or countries under relatively difficult living and working conditions, that he may be serving in the field with the armed forces of the United States or one or more of the United Nations and may be subject to military law and military discipline and that travel of Employee will be subject to the dangers of war and travel by land, sea and air. [24]

Agreement

In consideration of the premises, the mutual covenants and promises herein contained, and for other good and valuable considerations, the parties hereto agree as follows:

Article 1. Time and Duration of Employment

Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and

Employee accepts such employment with knowledge of the conditions recited above. The term of Employee's employment hereunder shall commence either

- (a) on May 1, 1943, if Employee shall, immediately prior to May 1, 1943, have been in the employ of Contractor under any other contract; or
- (b) on the date when Employee reports for duty at the time and place within the United States designated by Contractor, if Employee shall enter the employ of Contractor under this contract;

and shall continue, subject to the terms and conditions hereinafter set forth, for (i) the duration of the contract between the Government and Lockheed as from time to time extended and for such period after the termination or completion of said contract as Contractor may, in respect of such Employee, deem necessary for the winding up of the operations carried on under said contract after such termination or completion; and (ii) thereafter until return transportation to the United States for such Employee is made available by Contractor or by the Government to Contractor which transportation Contractor shall use its best efforts to obtain as promptly after the end of the period described in the foregoing clause (i) as is practicable under the circumstances then existing; and (iii) with respect to any Employee who has faithfully performed his duties and obligations here-

under throughout the term provided in the foregoing clauses (i) and (ii) or whose employment has been terminated hereunder through no fault of the Employee under Paragraph B of Article 11 hereof, for a period of sixty (60) days after such transportation is made available; provided, however, that with respect to the sixty (60) day period provided in clause three, any employee who shall during such period enter into any other employment, including the service of the Government, shall be deemed thereby to have voluntarily terminated his employment hereunder, and any employees who shall enter into such other employment shall throughout such period perform such services as may be required of him by the Contractor.

Article 2. Amount, Time and Mode of Payment of Salary

Employee's salary as long as he remains employed hereunder shall be at the rate of..... dollars per month lawful money of the United States (sometimes hereinafter referred to as foreign salary) payable monthly, in United States dollars except as hereinafter stated, provided, however, that Employee's salary [25] while employed hereunder in the United States shall be at the rate of sixty per cent (60%) of the foreign salary.

Unless otherwise approved by Contractor, the salary payable to Employee while employed hereunder outside of the United States (less any lawful deductions including any amounts paid to Employee

by Contractor at Employee's place of duty) shall be deposited for the account and at the risk of Employee in a bank in the United States to be designated by Employee or, in the absence of such designation, in a member bank of the Federal Reserve System to be selected by Contractor, and a duplicate deposit slip or receipt of such bank shall constitute conclusive evidence of payment to Employee.

Contractor shall pay to Employee at his place of duty from time to time, amounts which shall not in the aggregate exceed during any one (1) month, ten per cent (10%) of Employee's salary for such month, payable in the currency of the country in which he is located or in United States dollars, at the sole discretion of the Contractor, but the foregoing provision of this sentence shall not apply while Employee is in the United States.

The Employee will not seek reimbursement from the Contractor for any foreign exchange loss.

Prior to debarkation at the point of entry, Contractor shall pay the Employee the sum of Fifty Dollars (\$50.00) as an advance against his salary, and the amount of such advance shall be immediately deducted from the salary payable to or for the account of Employee thereafter or from successive salary payments in such amounts as Contractor may deem expedient or advisable.

For each continuous period of six (6) consecutive months of employment outside of the United States under this agreement, or under this and the previ-

ous agreement, between Contractor and employee covering services in connection with the Government contract, Contractor shall pay to Employee in addition to the salary to which Employee is otherwise entitled, the equivalent of one-half month's foreign salary, and such additional salary shall not be in lieu of pay during such reasonable vacation leave as may be authorized by Contractor. Vacations and sick leave policies will be governed by regulations prescribed by the Contractor.

Because of the emergency nature of the work and the salary to be paid to Employee, there shall be no restriction (except such as may be imposed by the medical authorities having jurisdiction) upon the number of work hours per day or the number of work days per week. The salary and compensation herein provided for Employee being substantially in excess of that which Employee has been receiving or would have received for similar services rendered in the United States at the date hereof, includes compensation for any extra and overtime services to be performed, and Employee shall not be otherwise paid or compensated for services which would ordinarily be extra or overtime services.

Failure on the part of the Contractor to respond to the precise time and mode of payment of salary prescribed herein shall [26] not be considered as a breach or default on the part of the Contractor in those cases in which such failure is the result of causes beyond Contractor's control.

Article 3. Performance by Employee

Employee shall throughout entire term of his employment hereunder, as hereinbefore provided, diligently and faithfully perform the services and duties required of him hereunder, and shall abide by all rules, regulations and requirements of Contractor, its officers, agents, and supervisory employees, as well as those of the United States Government and/or War Department, and all civil or military laws and regulations in effect from time to time at the place or places of duty hereunder.

Article 4. Transportation

Employee consents to travel by land, sea and air, according to routes and by any mode of conveyance which Contractor may reasonably specify in reporting for and rendering services during employment and in traveling to and from the site.

When directed by Contractor, Employee shall return to the United States without delay by such route and means as Contractor may designate. Except as herein otherwise provided, Contractor shall furnish, cause to be furnished, or reimburse Employee for his reasonable disbursements for transportation, food, and accommodations from his present place of residence to the place of foreign duty and return to the extent that his travel is authorized or approved by Contractor.

Article 5. Passports and Preparation for Travel

This agreement is predicated upon satisfactory

proof furnished by Employee that he is a citizen of the United States of America or Great Britain, and upon his ability to secure necessary passports, visas and such other permits as may be necessary to authorize his departure and absence from the United States, to pass such physical examination, and to submit to such disease immunization and fingerprinting as may be required by proper authority or by Contractor.

If Employee is so qualified, Contractor shall obtain or cause to be obtained the necessary passports, travel permits and visas, for Employee without cost to him.

Article 6. Baggage and Property of Employee

Employee's personal baggage shall not exceed an amount to be specified by Contractor at the time of embarkation, and Contractor shall not be liable or responsible for any property of Employee or for loss or damage thereto in transit or elsewhere.

Employee shall comply with all custom and other laws and regulations of the countries from, to, or through which any of the Employee's property may be transported. [27]

Article 7. Housing, Subsistence and Medical Services

During the time that Employee is employed hereunder at any place or places outside of the United States, Contractor shall furnish or cause to be furnished without cost to Employee, such adequate

food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Prior to departure from the United States, Employee shall submit to such physical examination, vaccination and inoculation as the Contractor shall direct at no expense to Employee. Thereafter Employee shall from time to time during the term of his employment submit to such further examination, vaccination, inoculation and other medical, dental, surgical, nursing and/or hospital treatment, preventative or curative as Contractor's or such other medical staff as may be specified by Contractor may from time to time require or deem necessary or desirable.

Article 8. Compensation for Disability, Death, Capture or Detention

A. (1) For the purpose of paying workmen's compensation benefits Contractor will provide benefits as prescribed in the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), and such benefits shall be payable to Employee or his dependents as provided in said Act. In event the injury to Employee resulting in disability or death occurs at or about the place where Employee's services are being rendered, or during transportation to or from such place, such injury shall be

presumed to have arisen out of and in the course of employment whether employee then actually was so engaged; provided, that no benefits shall be payable if the injury or death was occasioned solely by the intoxication of the Employee or by the willful intention of the Employee to injure or kill himself or another.

(2) Employee who is ascertained to be missing from his place of employment, whether or not such Employee then actually was engaged in the course of his employment, under circumstances supporting an inference that his absence may be due to the belligerent action of an enemy, or who is known to have been taken by an enemy as a prisoner, hostage, or otherwise, until such time as he is returned to his home, to the place of his employment, or is able to be returned to the jurisdiction of the United States, upon approval of Contractor and within the discretion of the Contracting Officer who executed the Government contract, or his duly authorized representative, shall be regarded solely for the purposes of this provision as deceased, and the benefits as are provided for death under the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (14 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), shall be [28] paid to his beneficiaries, as provided under this agreement, until such time as his return has been accomplished or he is able to be returned, or death in fact is established, or can be legally presumed to have occurred, and any pay-

ment made pursuant to this provision shall not in any case be included in computing the maximum aggregate or total payable compensation for death, as provided in the said Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress).

(3) If Employee, or his dependents in the event of death, be awarded benefits under any workmen's compensation law of the United States or under the workmen's compensation law of any state, territory, possession or other jurisdiction for disability, death, capture or detention, Contractor shall pay the benefits so awarded by competent authority and such payments shall be in lieu of the benefits provided in subsections (1) and (2) of this Section A.

(4) If this agreement provides for payment of wages or salary of Employee during any period in which Employee or his beneficiaries would also be entitled to benefits under subsections (1), (2) or (3) or this Section A, any benefits so payable hereunder for disability, death, capture or detention shall be a part of, and not in addition to, the wages or salary paid during such period pursuant to this agreement.

(5) Employee shall not be entitled to salary for any period during which he does not render services hereunder because of captivity and detention, nor to receive disability benefits for any period during which he is entitled to receive benefits for captivity and detention.

Article 9. Taxes

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or assessed by any foreign Government against Employee with respect to his residence, occupation, salary, or income, provided, however, that Employee shall immediately notify Contractor in writing of any such levy or assessment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

Article 10. Tools

Contractor shall furnish or cause to be furnished tools and equipment for rendition of services hereunder by Employee, but such tools and equipment hereunder shall remain at all times the property of the Contractor. [29]

Article 11. Termination

A. Contractor may terminate Employee's employment and his right to receive further salary hereunder for any of the following causes:

- (1) If the Contracting Officer representing the Government requires the dismissal of Em-

ployee as deemed by him to be necessary or advisable in the interests of the Government.

- (2) If Contractor has reason to believe that Employee is not trustworthy, careful, or is otherwise disqualified to render the services required hereunder.
- (3) If Employee, in the opinion of the medical examiner or examiners designated by Contractor, is found to be afflicted with any venereal disease.
- (4) If Employee violates any of the provisions of this agreement or fails faithfully and diligently to perform the services and duties required of him hereunder.

Upon termination by the Contractor under this Paragraph A, the Contractor may in its discretion, but shall not be required to, make available to Employee return transportation to the United States but shall have no obligation to pay Employee any salary for any period from and after such termination.

B. Contractor may further terminate Employee's employment without cause under the following circumstances:

- (1) Upon or after the completion of the Government contract.
- (2) Upon or after termination by the Government of the Government contract.
- (3) If, in the opinion of the Contractor, the health or physical condition of Employee is such as to render further services by Employee hereunder undesirable.

In the event of termination by the Contractor under this Paragraph B of Article 11, Contractor shall make available to Employee return transportation to the United States and Employee shall be entitled to receive salary as provided in Article 2 hereof until such return transportation is made available and for the period of sixty (60) days thereafter, as provided in said Article 1.

C. In the event that Employee terminates his employment hereunder voluntarily, he shall not from and after such termination be entitled to any salary hereunder or, unless otherwise approved by Contractor, to return transportation to the United States or reimbursement therefor. [30]

D. Contractor shall not arbitrarily terminate Employee's employment under Paragraph A of this Article and shall take into consideration in connection with any such termination all extenuating circumstances which may be involved, except when required by the Contracting Officer to terminate Employee's employment pursuant to sub-paragraph (1) of Paragraph A.

Article 12. Military Information

This agreement includes, refers to, or incorporates classified military information within the scope of the laws and regulations governing the safeguarding of military information. Employee shall comply with the requirements of the pertinent regulations, particularly Paragraphs 53 and 60 of Army Regulations No. 380-5, June 18, 1941, as they

may be amended or supplemented from time to time, and with any special instructions which may be issued pursuant thereto, and shall not publish, divulge, or sell anything which includes, refers to, or incorporates such classified military information without specific authority therefor from the Government. Employee shall not at any time subsequent to entering into this agreement, without the prior written consent of Contractor and the Government as represented by the War Department, publish or cause to be published in any manner or by any means, either by statements, photographs, pictures, books, articles, reports, charts, graphs, maps, or otherwise, written, pictorial, or oral, directly or indirectly relating to this agreement, the Government contract, his employment hereunder, or any other matters relating to the organization, equipping, or operation of said aircraft depot. The provisions of this paragraph may be enforced by injunctive relief and by any other applicable legal remedies.

Article 13. Employee's Work Record

Before Employee returns from the foreign site, Contractor shall make in duplicate a record of his employment stating the circumstances under which Employee is returning, upon which Employee shall set forth the nature, extent and the amount of all claims of Employee against the Contractor under or arising out of this contract or his employment hereunder. Both copies of this record shall be signed by Contractor and Employee and one copy

of this record shall be given to Employee who shall present same to Contractor upon his return to continental United States. No claims of any nature shall be recognized nor shall Employee be entitled to payment of any compensation, benefits or other sums whatever except upon the presentation of such record of employment and in accordance with the entries therein contained. Should such record of employment be lost or Employee be unable for any other reason to present the same upon his return, Contractor shall, as promptly as circumstances permit, obtain a duplicate of such record from the field office at the foreign site of the work and any claims which Employee may have will be adjusted promptly upon receipt of such duplicate, but not otherwise. [31]

Article 14. Miscellaneous

This agreement shall be construed and interpreted solely in accordance with the laws of the State of California, may not be assigned by either party without the written consent of the other party, constitutes the entire agreement between the parties hereto relating to the subject matter hereof, and shall not be binding until executed by an officer of the Contractor at its office in the City of Burbank, State of California.

Article 15. Headings

The headings of the various articles of this contract are for convenience and reference only and are not to be read or construed as a part of the contract.

In Witness Whereof Contractor has caused this agreement to be executed in duplicate in the City of Burbank, State of California, by its officer thereunto duly authorized and its corporate seal to be affixed hereto, and Employee has executed the same, in duplicate, the day and year first above written.

[Seal]

LOCKHEED OVERSEAS CORPORATION,

By

President.

Witness to signature of Employee:

.....

Interviewer Signature.

.....

Employee. [32]

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

Docket No. 9117. Promulgated November 12, 1946

Petitioner, a citizen of the United States, went to the British Isles in 1942 as an employee of Lockheed Overseas Corporation to do work essential to the war effort. Petitioner went aboard a British vessel then anchored in New York harbor on June 30, 1942. The vessel did not sail until the morning of July 1, 1942. Petitioner landed in the British Isles in July, 1942, and remained there until July, 1944, when he returned to the United States. After disembarking at Liverpool in July, 1942, pe-

petitioner went to a small base in Glazebrook, England, where he spent a few weeks and after that he was stationed at the main American air base in Northern Ireland. Held, that petitioner was not a bona fide nonresident of the United States for more than six months in the year 1942 within the meaning of section 116 I.R.C. and the compensation which he received for his overseas service in 1942 is not exempt from taxation. Held, further, that petitioner was not during 1943 a "bona fide resident of a foreign country or countries" within the meaning of section 116 I.R.C. as amended by section 148(a) of the Revenue Act of 1942 and the salary which he received from Lockheed in 1943 is not exempt from taxation. *Michael Downs, et ux*, 7 T.C., promulgated October 24, 1946, followed.

ROBERT A. WARING, ESQ.,
For the Petitioner.

A. J. HURLEY, ESQ.,
For the Respondent. [33]

The Commissioner has determined a deficiency in petitioner's income tax of \$1,311.01 for the year 1943. The Commissioner in explanation of the deficiency which he has determined stated in the deficiency notice as follows:

It is held that compensation in the amount of \$1,418.59 received by you during the year 1942 for personal services rendered in the United States for Vega Aircraft Corporation and Lockheed Overseas Corporation, and com-

pensation in the amounts of \$2,600.00 and \$5,262.50 received by you in 1942, and 1943, respectively, for services rendered while temporarily employed in Northern Ireland by Lockheed Overseas Corporation, represent taxable income under the provisions of Section 22 of the Internal Revenue Code, as amended.

It is held further that all earnings during your temporary employment in Northern Ireland may not be excluded from gross income under section 116 of the Internal Revenue Code, as amended.

In contesting the foregoing determination, the petitioner assigns errors as follows:

(a) In determining the taxable net income of petitioner for the year 1942, the Commissioner and Revenue Agent in Charge erroneously included the sum of \$2600.00 earned by taxpayer while a bona fide resident overseas.

(b) In determining the net income for the year 1943, the Commissioner and Revenue Agent In Charge erroneously included the sum of \$5,262.50 earned outside of the United States by taxpayer while a bona fide resident of North Ireland.

FINDINGS OF FACT

Petitioner is a single man, a citizen of the United States residing in Los Angeles, California. Petitioner timely filed income tax returns for the taxable years 1942 and 1943 with the Collector of In-

ternal Revenue for the District of Maryland. [34]

Early in 1942 Lockheed Aircraft Corporation entered into a contract with the United States Government in which the corporation agreed to organize, equip and operate an aircraft depot in Northern Ireland in connection with the war effort. The project was designated by the United States Army as operation "Magnet". In connection with the operation it was necessary for the Lockheed Aircraft Corporation and its subcontractor, Lockheed Overseas Corporation, sometimes hereafter referred to as Lockheed, to employ large numbers of skilled men in the United States and transport them to the British Isles. It was estimated that some 5,400 American citizens at one time or another were employed by Lockheed at the aircraft depot in Northern Ireland.

From January 1 to June 30, 1942, petitioner was employed as a secretary by Vega Aircraft Corporation and by Lockheed at Burbank, California. During that time he received a salary amounting to \$1,418.59.

On or about February 18, 1942, petitioner made out and signed a formal application for overseas employment with Lockheed and in connection with such application signed a contract shortly thereafter with the corporation in which he agreed to perform services for the company at an aircraft depot to be operated by it in the British Isles. The application which petitioner signed for employment with Lockheed was headed: "Application For

Foreign Service." The application contained the following question:

Are you willing to go to any part of the world?

Yes.

For how long? 1 year. 2 years. Longer X.

Petitioner in his application for foreign service thus indicated a willingness to serve as an employee of Lockheed overseas for more than two years, if necessary. The contract provided, inter alia, as follows:

Article 1. Time and Duration of Employment

Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge of the conditions recited above. Subject to the terms and conditions hereinafter set forth, Employee's employment hereunder shall commence when he reports for duty at a point within the United States to be designated by Contractor, at the time and place designated by Contractor, and shall continue until November 1, 1942, or such later date as may be agreed upon and thereafter until sixty (60) days after return transportation to the United States is made available by Contractor, it being understood that such return transportation shall be made available on November 1, 1942, or the later date agreed upon or as soon thereafter as is practicable under the circumstances then existing.

Article 7. Housing, Subsistence and
Medical Services

During the time that Employee is employed hereunder and remains at the place or places of his duty outside of the United States, Contractor shall furnish or cause to be furnished, without cost to Employee, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Employee shall submit prior to departure and from time to time during his employment to such vaccination, inoculation, and/or any other medical, dental, surgical, nursing, and/or hospital treatment, preventative or curative, as the Contractor or other medical staff at the destination or elsewhere may from time to time specify, without expense to Employee.

Contractor may direct the return to the United States of Employee, if in Contractor's judgment Employee's health condition is unfavorable. [36]

* * * * *

Article 9. Taxes

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or assessed by any foreign Government against Employee with respect to his residence, occupation, salary, or income, provided, however, that Employee shall immediately notify Contractor in writing of any such levy or assess-

ment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

Pursuant to the terms of his contract, petitioner on June 30, 1942, boarded the H.M.S. Maloja, a vessel of British registry and under a British captain and officers, berthed in New York harbor. Because of the danger of German submarines, Hoofnell was not allowed any contacts with the mainland after he boarded the vessel. The Maloja, with petitioner aboard, sailed from New York harbor early on the morning of July 1, 1942, bound for the British Isles. Petitioner landed in Liverpool, England.

Petitioner was admitted to the British Isles on a visa as an employee of Lockheed. This visa, under British law, had to be put in use within three months from the date it was issued but the time that the holder would be allowed to stay is not mentioned therein. The visa, under British law, would permit him to remain for the purpose for which it was given, as an employee of Lockheed, and if and when Lockheed terminated its work over there, petitioner would be expected to depart with-

in a reasonable time when transport was available and subject to any extensions that might be given him by the home office in London or local authorities in Belfast. [37]

After disembarking, petitioner was first assigned to a small base near Glazebrook, England, for several weeks, after which he was transferred to the main base in Ireland.

The expiration date of petitioner's contract was extended by agreement of the parties until May 1, 1943, at which time he entered into a new contract with Lockheed Overseas Corporation. This new contract provided, inter alia, as follows:

Article 1. Time and Duration of Employment

Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge of the conditions recited above. The term of Employee's employment hereunder shall * * *

* * * *

* * * continue, subject to the terms and conditions hereinafter set forth, for (i) the duration of the contract between the Government and Lockheed as from time to time extended and for such period after the termination or completion of said contract as Contractor may, in respect of such Employee, deem necessary for the winding up of the operations carried on under said contract after such termination or

completion; and (ii) thereafter until return transportation to the United States for such Employee is made available by Contractor or by the Government to Contractor which transportation Contractor shall use its best efforts to obtain as promptly after the end of the period described in the foregoing clause (i) as is practicable under the circumstances then existing; * * *

The Petitioner remained in the employ of Lockheed stationed in Northern Ireland until July 13, 1944, when he returned to the United States. [38]

Petitioner received as compensation for personal services rendered to Lockheed in the British Isles and Northern Ireland during the year 1942 the sum of \$2,600 and during 1943 the sum of \$5,262.50, of which sums 90 per cent was deposited by the corporation to the account of the petitioner with the Bowling Green Trust Co., Bowling Green, Kentucky, pursuant to Article 2 of his employment contract.

Petitioner did not at any time make any application to become a citizen of Northern Ireland, or a British subject. During the taxable year 1943 he was domiciled in the United States and his intentions were to remain in Ireland not longer than the duration of the war or until his employment with Lockheed Overseas Corporation terminated, at which time he intended to return to the United States. He did not pay any income taxes to the Government of Northern Ireland or to the United

Kingdom of Great Britain. Taxpayer stated on both his returns for 1942 and 1943 as follows:

Taxpayer claims exemption from Federal Income Tax for the period June 30, 1942, to July 12, 1944, for the reason that during that period he was a resident of the British Isles and North Ireland within the meaning of the Revenue Code and of Sec. 116 thereof and as the term resident is defined in Regulations 111 Sec. 29. 211-2.

Taxpayer embarked on June 30, 1942, on H.M.S. Maloja bound for British Isles and Ireland, where he remained a resident until his return to New York City on July 12, 1944.

When he applied to Lockheed for the above employment he intended to and promised them he would remain in their overseas service as long as their contract with the U. S. Army required for the duration of the war and as long thereafter as needed: He had no definite intentions as to his stay overseas other than as above stated; he did not know or plan when he might be able to return because of the uncertainty of the duration of the war.

Any of the stipulated facts not embodied in the foregoing facts are incorporated herein by reference.

OPINION

Black, Judge: This proceeding involves a deficiency in income tax for the year 1943 in the amount of \$1,311.01. The deficiency includes an

unforgiven tax liability for the taxable year 1942 in the amount of \$172.60. That is why the year 1942 is involved.

Petitioner was paid \$2,600 for his services overseas with Lockheed in 1942. If petitioner was absent from the United States more than six months in 1942, then the \$2,600 is not taxable to him. Both parties agree on this. The applicable statute is section 116, I.R.C., as it existed before the 1942 Act amendment and is printed in the margin.¹ The statute in question has been interpreted to mean that the taxpayer must be actually physically absent from the United States for more than six months in the taxable year before he is entitled to the granted exemption. See *Commissioner v. Fiske's*

¹Sec. 116. Exclusions From Gross Income.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) **Earned Income From Sources Without United States.**—In the case of an individual citizen of the United States, a bona fide non-resident of the United States for more than six months during the taxable year, amounts received from sources without the United States except amount paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

Estate, 128 Fed. (2d) 487; Commissioner v. Swent et ux., 155 Fed. 2d) 513.

The decision of the question whether petitioner was absent from the United States for more than six months in 1942 depends upon the answer to a simple question of law, namely: Is an American citizen "outside the United States" when he is aboard a vessel belonging to a foreign Government tied to a pier in New York harbor? Petitioner boarded a British steamer in New York harbor on June 30, 1942, bound for the British Isles. After he boarded the British vessel he was kept there and was not allowed to communicate with anyone on the outside. This was on account of guarding against submarine danger. The vessel, however, did not sail until the morning of July 1, 1942. Petitioner seems to argue that was "outside the United States" the moment he boarded the British vessel. If that were true, then of course petitioner was absent from the United States all of July, August, September, October, November and December and part of a day in June. That would mean that he was absent from the United States for more than six months in 1942 and would be entitled to have the \$2,600 excluded from his income in 1942.

Respondent argues, however, that although petitioner boarded the British vessel in New York harbor on June 30, 1942, he did not sail until the morning of July 1st and that as long as he was in New York harbor he was still in the United States, even though aboard a British vessel. We see no escape from this conclusion. [41]

Whatever may be the International Maritime law with respect to jurisdiction over crimes committed aboard foreign vessels, we do not think such law would have any application to such a question as we have here. While it may be true that for certain purposes British sovereignty extended over the vessel H.M.S. Maloja while she was anchored in New York harbor, nevertheless for purposes of section 116(a), *supra*, petitioner was not "outside the United States" as long as the ship remained at its pier in New York harbor. Petitioner cites no case which would support his position on this issue and we do not know of any. We, therefore, hold on the facts that petitioner was not a bona fide nonresident of the United States for more than six months during the taxable year 1942 and the \$2,600 in question should not be excluded from his income in 1942.

As to the \$5,262.50 which petitioner received from Lockheed for overseas service in 1943, section 116 I.R.C. as amended by section 148(a) of the Revenue Act of 1942 governs. That section is printed in the margin.² This same section of the statute and the

²Sec. 116. Exclusions From Gross Income.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) Earned Income From Sources Without the United States:

(1) Foreign resident for entire taxable year.—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona

applicable Treasury Regulations were fully discussed by us in the recent cases of Arthur J. H. Johnson, 7 T.C. and Michael Downs, et ux, 7 T.C., both promulgated October 24, 1946. The case of Michael Downs was very similar in its facts to those present in the instant case. It did not involve the year 1942 but it did involve the year 1943 under facts which we think are not distinguishable from those which are present here. Therefore, following Michael Downs, supra, we decide the issue as to 1943 in favor of the respondent.

Reviewed by the Court.

Decision will be entered for the respondent.

Van Fossan and Leech, JJ., dissent on the second point.

[Seal] [43]

fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individuals shall not be allowed as a deduction from his gross income any deduction properly allocable to or chargeable against amounts excluded from gross income under this subsection.

The Tax Court of the United States
Washington

Docket No. 9117

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated November 12, 1946, it is

Ordered and Decided: That there is a deficiency in income tax of \$1,311.01 for the year 1943.

/s/ EUGENE BLACK,
Judge.

Entered Nov. 13, 1946. [44]

[Title of Tax Court and Cause.]

STIPULATION AS TO VENUE

Pursuant to Section 1141 (b) (2) of the Internal Revenue Code and under the authority of *Industrial Ass'n. v. Commissioner*, 323 U. S. 310, the parties hereto, through their respective counsel, hereby stipulate and agree to, and do, designate the United

States Circuit Court of Appeals for the Ninth Circuit as the court to review the above-entitled cause.

Dated this 19th day of March, 1947.

/s/ ROBERT A. WARING,
Counsel for Petitioner.

/s/ SEWALL KEY,
Counsel for Respondent.

Filed March 21, 1947. [45]

United States Circuit Court of Appeals
For the Ninth Circuit

Docket No. 9117

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED STATES

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Comes now J. Gerber Hoofnel, petitioner herein
and respectfully shows:

I.

NATURE OF THE CONTROVERSY

The Respondent determined a deficiency in the income tax against the Petitioner for the calendar year 1943 in the amount of \$1311.01.

This deficiency arose from the denial of taxpayer's claim to exemption from individual income tax of his salary from Lockheed Overseas Corporation of \$2600.00 for the last half of the calendar year 1942 and of \$5,262.50 for the calendar year 1943, while a bona fide resident of the British Isles and North Ireland [46] within the meaning of Sec. 116 (a) (1) as amended by Sec. 148 (a) of the Revenue Act of 1942 and under Sec. 29.211-2 of Treasury Regulations 111.

Petitioner filed an appeal to the Tax Court of the United States.

Thereafter on November 13, 1946, The Tax Court of the United States rendered its decision in favor of the respondent. Said decision describes in detail the controversy involved, which briefly is as follows:

Early in 1942, Lockheed Aircraft Corporation (L. A. C.) entered into a contract with the United States Government to organize, equip and operate an aircraft depot at Belfast in Northern Ireland to employ a large number of skilled mechanics (ultimately some 5,400 American citizens in all). These were picked mechanics from varied industries throughout the United States but mostly from aircraft industries in California. Actually the opera-

tion was under a subsidiary, Lockheed Overseas Corporation (L. O. C.) and was under direction of the U. S. Army as operation "Magnet".

J. Gerber Hoofnel, a single man, was employed at Burbank, California, by Vega Aircraft Corporation, a subsidiary of Lockheed Aircraft Corporation, from Jan. 1, 1942, until about Feb. 18, 1942, when he made application and signed a contract for overseas employment with L. O. C. and shifted to same. In his written application he stated that he was willing to stay for over two years. The contract provided that L. O. C. would reimburse him for any and all taxes lawfully levied or assessed by any foreign government against [47] him while an employee of the corporation in the British Isles and North Ireland.

Pursuant to the terms of his contract, petitioner on June 30, 1942, boarded the H.M.S. Maloja, a vessel of British registry and under a British captain and officers, berthed in New York harbor. Because of the danger of German submarines, Hoofnel was not allowed any contacts with the mainland after he boarded the vessel. The Maloja, with petitioner aboard, sailed from New York harbor early on the morning of July 1, 1942, bound for the British Isles. Petitioner landed in Liverpool, England.

After disembarking, petitioner was first assigned to a small base near Glazebrook, England, for several weeks, after which he was transferred to the main base in Ireland.

As of May 1, 1943, he entered into a written contract with Lockheed in which he agreed to render

such services in connection with said aircraft depot as might reasonably be assigned to him for the duration of the contract between the Government and Lockheed as from time to time extended (which meant for the duration of the war and beyond).

At no time during his stay overseas did the British demand any income tax of him nor did our Treasury Department require any income tax to be withheld from his salary by L. O. C. although ninety per cent of said salary was deposited by L. O. C. to the credit of taxpayer in his bank in the United States per Article 2 of his employment contract.

Within ninety days of his return, July 12, 1944, to [48] New York City, taxpayer made an income tax return of his total salary, domestic and foreign, earned for the calendar years 1942, 1943 and 1944, to the Collector at Baltimore, Maryland, in which he claimed to be exempt from individual income tax for the period he was overseas on the ground that he was then a bona fide resident of the British Isles as first herein noted. These returns were later transferred to the Los Angeles office of the Collector and the deficiency tax herein at issue was assessed by that office.

In its opinion in the Hoofnel case, the Court refers to and predicates its decision upon its decision in that of Michael Downs, et ux., 7 T.C. No. 123, which by stipulation was tried at the same time with and upon substantially identical facts so far as concerns the taxable year 1943. And in turn the Downs decision depends upon references repeatedly made by the Court to its opinion in the

case of Arthur J. H. Johnson, 7 T. of these cases were promulgated on the Tax Court.

In its opinion, the Tax Court taxpayer and the Government as much as Sec. 116 I.R.C. does not de of "bona fide resident of a foreign tries", that Treasury Regulations and 29.211-2 must be looked to to interpretation of the words thus use

The pertinent part of the latter decisive of the issue here involved dent for the purpose of the incom signed to tax aliens resident in [4 but has been repeatedly held by th partment and the Tax Court to e reverse to citizens of the United Sta The substantial part of the Section

"* * * One who comes to the U a definite purpose which in its promptly accomplished is a t his purpose is of such a nature stay may be necessary for its and to that end the alien make porarily in the United States

Commissioner of Internal Revenue

disregarding the plain language of the above Regulations, found that Congress had in express language vested in the Commissioner discretionary power to determine this question of residence and that the attitude of the Commissioner is correctly stated in I. T. 3642 Cum. Bull. 1944, page 262. This decision concerns a citizen of the United States who went to Canada Jan. 1, 1943, on a war project for the year 1943 and who intended to remain there until May, 1944.

Following its decision in *Arthur J. H. Johnson*, 7 T.C., decided the same day as the *Downs* and *Hoofnel* cases, the United States Tax Court held that taxpayer was not a bona fide resident of the British Isles for the calendar year 1943 and his overseas income for that year was therefore taxable. So closely are the *Downs* and *Hoofnel* decisions tied into that of *Johnson* that one can well read the *Downs* and *Hoofnel* decisions without a copy of the *Johnson* decision and yet the *Johnson* case is not in [50] point because he went to Greenland for a limited period; where, under the "condition unique in history" (in the language of the Tax Court) the United States, in a treaty with Denmark, had complete jurisdiction in the base

regard the plain language of Regulations 111 Sec. 29.211-2, as above quoted, and assess the tax here involved;

(b) in finding as a fact or deciding as a matter of law that I.R.C. Sec. 116 (a) (1) vested in the Commissioner discretionary power to determine that taxpayer was not a resident of the British Isles for the taxable year 1943, even though he acted bona fide and met the conditions of Regulations 111 Sec. 29.211-2.

(c) in finding as a fact or deciding as a matter of law that taxpayer was not a bona fide non-resident of the United States for more than six months during the taxable year 1942, and that the \$2600 earned by him during that period should not be excluded from his 1942 income. [51]

II.

The Court in Which Review Is Sought

The United States Circuit Court of Appeals for the Ninth Circuit is the Court in which review of said decision of The Tax Court of the United States is sought pursuant to the provisions of Section 1141 of the Internal Revenue Code.

III.

Venue

For more than two years last past preceding, petitioner has resided in the County of Los Angeles, State of California. The deficiency notice involved in this appeal was issued by the Collector of Internal Revenue at Los Angeles in the Sixth District

of California, whose office is located within the Ninth Judicial Circuit of the United States. The hearing before the United States Tax Court was held in Los Angeles, California.

The parties hereto have not stipulated that said decision may be reviewed by any Court of Appeals other than the one herein designated.

Wherefore, the Petitioner prays that the decision of The Tax Court of the United States herein be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and rules of said Court and transmitted to the Clerk of [52] said Court for filing; and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Dated: February 7, 1947.

ROBERT A. WARING,
Attorney for Petitioner.

Received and filed T.C.U.S. Feb. 10, 1947. [53]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue:

You are hereby notified that J. Gerber Hoofnel did, on the 10th day of February, 1947, file with

the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decisions of this Court heretofore rendered in the above-entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 12th day of February, 1947.

/s/ VICTOR S. MERSCH,
Clerk, The Tax Court
of the United States.

Service of copy of petition for review acknowledged February 12, 1947.

/s/ J. P. WENCHEL, CAR
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

Filed T.C.U.S. Feb. 12, 1947. [54]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVUE

To John P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C., Attorney for the Respondent:

Please Take Notice that on the 10th day of February, 1947, the undersigned filed with the Clerk of The Tax Court of the United States the petition

of J. Gerber Hoofnel, a copy of which is annexed hereto, for the review by the United States Circuit Court of Appeals for the Ninth Circuit of the final order and decision of the Court heretofore rendered in the above entitled case.

Dated this 10th day of February, 1947.

ROBERT A. WARING,
Attorney for the Petitioner.

ADMISSION OF SERVICE

Service of a copy of the above notice and a copy of the petition for review is hereby accepted this 11th day of February, 1947.

/s/ J. P. WENCHEL, CAR
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

Filed T.C.U.S. Feb. 12, 1947. [55]

[Title of Circuit Court of Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS
TO BE RELIED ON AND DESIGNATION
OF PARTS OF THE RECORD TO BE
PRINTED.

Comes now J. Gerber Hoofnel, the petitioner for review in the above-entitled cause, and states that the points on which he intends to rely in this cause are as follows:

1. The Tax Court of the United States erred in finding as a fact or deciding as a matter of law that

the Commissioner of Internal Revenue had discretionary power to disregard the plain language of Regulations 111 Sec. 29.211-2, and assess the tax here involved.

2. The said Tax Court erred in failing to find as a matter of fact and deciding as a matter of law that petitioner under said Sec. 29.211-2 of said Regulations was a bona fide resident of the British Isles and North Ireland for the calendar year 1943, and exempt from income tax on his overseas salary of \$5262.50 for that year. [56]

3. The said Tax Court erred in finding as a fact or deciding as a matter of law that I. R. C. Sec. 116(a)(1) vested in the Commissioner discretionary power to determine that taxpayer was not a resident of the British Isles for the taxable year 1943, even though he acted bona fide and met the conditions of Regulations 111 Sec. 29.211-2; and said Court erred in failing to find that under said section of I. R. C. and under said section of said Regulations, the petitioner was exempt from income tax on his said overseas salary.

4. The said Tax Court erred in finding as a fact or deciding as a matter of law that taxpayer was not a bona fide non-resident of the United States for more than six months during the taxable year 1942, and that the \$2600 earned by him during that period should not be excluded from his 1942 income.

Petitioner hereby designates the entire record, as certified to the Clerk of the above-entitled Court,

as necessary to be printed for the consideration of the points set forth above.

/s/ ROBERT A. WARING,
Attorney for Petitioner.

Service admitted March 21, 1947.

/s/ J. P. WENCHEL, CAR

Received and filed T.C.U.S. March 26, 1947. [57]

The Tax Court of the United States

Docket No. 9117

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF EVIDENCE

The following is a statement of evidence in narrative form in the above entitled cause.

This cause came on for hearing before Honorable Eugene Black, Judge of The Tax Court of the United States, on June 20, 1946, Robert A. Waring, Esq., appearing on behalf of Petitioner and A. J. Hurley, Esq. (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of Respondent.

Before any witness was called, it was stipulated

that the testimony of Mr. Messer, Mr. Osgood and Mr. Miller be incorporated in the record in the Hoofnel case, as it had just been presented in the consolidated hearing in the cases of Michael Downs and Eleanor J. Downs (husband wife), Tax Court Docket numbers respectively, 9643 and 9644.

Stipulations of facts between counsel for petitioner and respondent were received by the Court, in evidence as Petitioner's Exhibit No. 1. [58]

Whereupon,

MAURICE VERNER MILLER

was called as witness for respondent and testified that he was then acting British Vice-Consul in the British Consulate General at Los Angeles; that the principal part of his work is issuance of visas to American citizens for travel to the British Isles. Being shown a copy of a visa issued to an employee of Lockheed Overseas Corporation, he was asked if such visa permitted the holder thereof to remain indefinitely in the British Isles. He replied that visa would permit the holder to remain for the purpose for which it was given as an employee of Lockheed, and if Lockheed terminated the work over there, he would be expected to depart within a reasonable time when transport was available, and subject to any extensions that might be given him by the home office in London, or local authorities in Belfast.

BELMONT WESLEY MESSER,

called as witness for petitioner, testified in part as follows:

At the time of the organization of the group of Lockheed Overseas men that went over to Britain and Ireland, my position was that of manager of the Industrial Relations department of Lockheed Overseas Corporation. Before we left to go overseas, it was necessary to employ about three thousand men between the middle of January and the first of July, 1942. We were very much under the direction of the Army. It became necessary for us to appeal to organizations throughout the United States in order to obtain the very specialized types of mechanics that we needed. We went into the engine factories back east, and watch repair plants for skilled instrument people, and at that time received cooperation in the [59] form of telegrams from General Arnold to practically all manufacturers in the United States to release to us such essential personnel as we felt we needed. The base in Ireland had a much wider scope than simply maintenance. In fact, as we went along it became more and more of a modification base. As the aircraft that were developed in this country were sent to the war fronts, and put into operation, it was determined that under flying conditions and under actual wartime conditions, several weaknesses existed. As these men returned from missions, bombing missions and all sorts of flying missions over Europe, the faults of aircraft as produced in this

country were determined, and it was the responsibility of our base, in behalf of the Eighth Air Force and Ninth Air Force, to redesign and rebuild as necessary the aircraft that was being sent to us to the Army, in order to make them maximally effective in service. That made the base very much subject to bombing by the German fliers. Due to the nature of the project, and the uncertainty of people returning, we were instructed by the management of the corporation to make the picture to the individuals about to be employed as black as possible. We knew we were going over there at the time when the submarine hazard was the greatest during the entire war. Our contracts stipulated that we were more or less on our own, if taken prisoner, and at the time the men were going over we pointed out to them the possibility of being taken prisoner or being bombed, or being sunk by a submarine, was very serious.

I was in North Ireland from approximately June 26th of 1942 continuously until the first part of July, 1944. The project was referred to as Operation Magnet. The total number of American [60] citizens at any one time on the base was in the vicinity of three thousand. The total number of employees, counting those who came over and returned before the completion, brought the total number of people who went to the project and returned, to approximately five thousand and four hundred.

Whereupon,

LEWIS R. OSGOOD,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

When the Lockheed Overseas group was being organized early in 1942, I was Personnel division supervisor for them (under Mr. Messer). Personally, in the early part of 1942 and approximately in May, I was sent east for a short period to interview a number of applicants in the various aircraft and accessory plants, and our instructions were to paint rather a black picture, or one which indicated the possibilities, so that they would understand, and discourage anyone who might be there just for the trip, although this first contract they were signing was for only six months. In our interview, however, we got their reaction to a longer period of time, as the form which has been produced before the court notes, and in our conversation we were not interested, would not employ anyone who was not interested in staying at least a year, and if there was an indication of a return even at that time, we were somewhat doubtful because we felt that it was a long term project.

J. GERBER HOOFNEL,

called as a witness for and on behalf of his petition, having been first duly sworn, was examined and testified as follows: [61]

We got on the boat on June 30th (1942), and we could not get off—were restricted to the boat and could not communicate with anyone from it. It was a boat under British registry with British officers. When I went over I wanted to stay over there as long as was necessary. In fact, I did not know how long I would be there when I left. Lockheed gave us a form to fill out before leaving the United States at the time we were employed. I believe one question on there asked was “Will you stay one year, two years, or longer?” and I checked the place on that form where it said “or longer,”—in other words, my intention was to stay as long as was necessary, for the duration of the war. I signed an application and agreement that I would do that.

After landing in Liverpool, we went to a small base at, I believe the name of the town was Glazebrook, England. The base in North Ireland had not been finished, at the time of our arrival, all the huts had not been erected, streets had not been laid. It was just a mudhole and the houses had to be built before we could go there, so we stayed in England for about two weeks or longer before we were transferred then over to the main base in Ireland. At the time we arrived there the houses were not completed at all, the streets were not laid—we waded in mud clear up to our knees. As I understood the situation, the British government was supposed to have let a contract for the completion of these buildings—However, the buildings were not completed, or the streets laid, and other construction

work done. The men on the base, the Americans, had to help in finishing the completion of this base. It took several months before it was finally completed. [62]

While overseas I was secretary to Mr. B. W. Messer. I was never asked by the British government or the Irish government to pay any income tax while I was over there. The contract we signed with Lockheed stipulated that if the British government called upon us for taxes, that Lockheed would pay said tax. No official of the treasury department or of Lockheed withheld any of my income impounded in the United States after June, 1943. Nothing was withheld until I came back and landed in the United States.

It was necessary that I have an occupational deferment when I left the United States in 1942 and secure a permit from my draft board to leave and remain outside of the country for six months and the permit had to be renewed every six months, but the company home office in Burbank took care of that.

We lived on this base provided by Lockheed. One of the reasons for that, amongst other reasons, was, we were subject to being called to duty 24 hours per day, and it was quite necessary that we be close to our place of employment. It was my intention to return to the United States as soon as my work with Lockheed in the British Isles was complete, and I never at any time intended to stay in North Ireland.

Whereupon the income tax returns of J. Gerber Hoofnel for the period commencing June 30, 1942, and ending January 1, 1943, and for the calendar year 1943, were introduced by respondent and received in evidence by the Court as Respondent's Exhibits A and B.

Approved:

/s/ J. P. WENCHEL, CAR.

Received and filed March 26, 1947. [63]

United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 9117

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S DESIGNATION OF
CONTENTS OF RECORD ON REVIEW

Petitioner hereby designates for inclusion in the record on review in the above-entitled proceeding, the following:

The complete record of all the proceedings and evidence taken before The Tax Court of the United States and all matters required by Subdivision (g)

of Rule 75 of the Federal Rules of Civil Procedure; excepting exhibits filed as evidence, but including the statement of evidence in this cause heretofore prepared, served and filed.

Dated: March 8, 1947.

/s/ ROBERT A. WARING,
Attorney for Petitioner.

No counter designation will be filed.

Service admitted March 21, 1947.

/s/ J. P. WENCHEL, CAR

Received and filed T.C.U.S. March 26, 1947. [64]

Tax Court of the United States

Docket No. 9117

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 64, inclusive, contain and are a true copy of the transcript of record, papers, and

proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 9th day of April, 1947.

[Seal] /s/ VICTOR S. MERSCH, E.M.T.
Clerk, The Tax Court
of the United States.

[Endorsed]: No. 11593. United States Circuit Court of Appeals for the Ninth Circuit. J. Gerber Hoofnel, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed April 22, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.